Supreme Court, U.S.
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No. 05-1656

IN THE

Supreme Court of the United States

RICKEY BROWN,

Petitioner,

v.

PARKER DRILLING OFFSHORE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JEFFERSON R. TILLERY
Counsel of Record
NORMAN E. ANSEMAN, III
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE
& DEGEGRE, L.L.P.
201 St. Charles Avenue
Suite 4800
New Orleans, LA 70170
(504) 582.8432

Attorneys for Respondent

203143

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Petitioner's writ meets any of the Rule 10 requirements for discretionary review of the United States Court of Appeals for the Fifth Circuit's decision in *Rickey Brown v. Parker Drilling Offshore Corporation*, 410 F.3d 166 (5th Cir. 2005) in which the Fifth Circuit determined in accordance with established federal maritime law and federal precedent that Petitioner had willfully concealed a previous medical condition in light of his blatant lies to his Jones Act employer concerning his prior medical condition.

2. Whether Petitioner has improperly raised the issue of whether the Fifth Circuit's decision in *Brown v. Parker Drilling* as well as its decision in the 1968 opinion of *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968) are in conflict with Supreme Court precedent because this argument was not made at either the District Court level or before the Appellate Circuit. Petitioner's failure to raise this argument before either court deems this argument waived before this Court and thus this matter should not be considered.

3. Whether the *Brown* majority correctly determined that the jury was clearly erroneous in finding that Petitioner, an admitted liar, had willfully concealed a previous medical condition. Petitioner admitted that he failed to disclose pertinent medical information requested by Parker, which he knew was important to Parker because he had been terminated by another employer for concealing the exact same medical condition just two months before applying to Parker.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Parker Drilling Offshore Corporation, is wholly owned by Parker Drilling Company, which is publicly traded.

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REASONS FOR DENYING PETITION

1. Petitioner's writ does not meet the Rule 10 requirements because the *McCorpen* and *Brown* decisions are in line with federal precedent, entrenched federal maritime law, and do not contradict policies of the United States Supreme Court.

Under Supreme Court Rule 10, a petition for writ is granted only for "compelling grounds." Rule 10 of the Rules of the Supreme Court of the United States sets forth the bases for a grant of certiorari. First, such discretionary review is available to resolve a conflict among the federal courts of appeals and the state courts. This is "[a] principal purpose for which [the Court] use[s] [its] certiorari jurisdiction."[1] Second, a petition for certiorari may be granted where there are "special and important" policy reasons for the Court to decide an unsettled question of federal law. "But this Court does not sit to satisfy a scholarly interest . . . [or] for the benefit of the particular litigants."[2] Third, certiorari may be granted where the appellate court has decided a federal question that conflicts with this Court's established decisions. Lastly, Rule 10 specifically provides that review is "rarely granted" when the issue is only an alleged misapplication of law.

Petitioner does not claim that a conflict or an important policy issue exists with respect to this case. Petitioner's contention is that that the Fifth Circuit deviated from

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1. *Braxton v. United States*, 500 U.S. 344, 347 (1991).

2. *Rice v. Sioux City Memorial Park Cemetary*, 349 U.S. 70, 74 (1955).

established law is simply wrong. Petitioner argues that the *McCorpen*[3] and *Brown*[4] decisions are contrary to Supreme Court precedent and thus this Court should exercise discretionary review of this matter. This argument is without merit.

While it is true that the Supreme Court has not explicitly endorsed the *McCorpen* decision, this Court declined discretionary review of *McCorpen*. Moreover, and significantly, there is no dispute among the circuits concerning *McCorpen*. In fact, since issued in 1968, *McCorpen* has been cited in 221 decisions which are located on Westlaw, none of which disagreed with *McCorpen*.[5] Additionally, *McCorpen* is based upon well entrenched federal maritime law as traced by the *McCorpen* panel.

Indeed, the *McCorpen* panel traced the history of the willful concealment defense.[6] The *McCorpen* panel specifically looked to other federal circuits including the Fourth Circuit[7], the Ninth Circuit[8], the Seventh Circuit[9], the Second Circuit[10] as well as

3. 396 F.2d 547 (5th Cir. 1968).

4. 410 F.3d 457 (5th Cir. 2005).

5. As acknowledged by the district court in *McMillian v. Tug Jane A. Bouchard*, 885 F. Supp. 452 (E.D.N.Y. 1995), *McCorpen* has been accepted by most circuits except the 2nd Circuit which has a more *stringent* approach to this issue that requires less proof by the employer to establish the willful concealment defense.

6. *McCorpen*, 396 F.2d at 548-550.

7. *Evans v. Bildberg Rothchild Co.*, 382 F.2d 637 (4th Cir. 1967).

8. *Burkert v. Weyerhaeusrer Steamship Co.*, 350 F.2d 826 (9th Cir. 1965).

9. *Sulentich v. Interlake Steamship Co.*, 257 F.2d 316 (7th Cir. 1958).

10. *Ahmed v. U.S.*, 177 F.2d 898 (2nd Cir. 1949).

several District Court cases to develop its willful concealment standard.

To suggest that the *McCorpen* decision is contrary to Supreme Court precedent and federal maritime law is far reaching at best. Maintenance and cure is a fault free system in which the maritime employer provides maintenance (daily sustenance) and cure (medical care) for a seaman who suffers an injury or illness in the service of the vessel while on a seafaring voyage. The doctrine is based upon the employment contract and the representations made with respect to same between the Jones Act employer and the seaman.

As noted by the *McCorpen* panel, the doctrine of maintenance and cure is essentially a contractual form of compensation between the seaman and the employer, which is "deep rooted in maritime law and is an incident or implied term of a contract for maritime employment."[11] The *McCorpen* panel determined that if an employer requires a seaman to submit to a pre-hiring medical examination or interview and the seaman intentionally misrepresents or conceals material medical facts, the disclosure of which is plainly desired, then the seaman has fraudulently entered into the relationship and is not entitled to maintenance and cure benefits if there is a causal relation between the concealed medical condition and the current injury.[12]

Contrary to the allegations of Petitioner, this defense is not in direct conflict with the policy enacted by this Court concerning the liberal policies of rights of seaman. Rather,

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11. *McCorpen*, 396 F.2d at 548.

12. As noted in *Tug Jane A. Bouchard*, *supra*, the Second Circuit Court does not require the causal connection.

this defense is in line with this policy as it rewards the seaman who truthfully entered into the employment relationship because it allows the seaman to recover maintenance and cure regardless of fault. On the other hand, if the seaman lied and entered into the relationship fraudulently, then the relationship does not exist because the seaman would not have been hired had he told the truth and hence, he is not entitled to the liberal fault free recovery.

The purpose of this rule is obvious. The work offshore, such as work on seagoing vessels at the turn of the century, is dangerous and the seaman must truthfully represent his medical history for his own safety and that of the crew. If the seaman misrepresents the information which is plainly desired, then his actions are fraudulent and he should not benefit from same. Hence, the well-entrenched federal maritime law defense of willful concealment.

Lastly, Brown's argument that the majority's finding with respect to the intentional concealment prong of the willful concealment defense is contrary to federal maritime law is likewise without merit. The majority relied upon *McCorpen* and an unpublished Ninth Circuit decision[13] to determine that an analysis of the intentional concealment prong does not require a "finding of subjective intent."[14] The majority determined this in order to prevent seaman from "blatantly misrepresenting their medical history on questionnaires and then plead ignorance before a jury."[15] The majority's finding is firmly in line with the policies behind the representations made within the employment relationship and the fault free maintenance and cure system.

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13. *Vitcovich v. Ocean Rover,* 106 F.3d 411, 1997 WL 21205 (9th Cir. 1997).

14. *Brown, supra*, 410 F.3d at 174.

15. *Id.* at 175.

2. This Court Should Deny this Petition because the issue presented before it was not raised at the District Court level or before the Circuit Court.

Petitioner argues that the *Brown* decision as well as the Fifth Circuit's decision in the *McCorpen* matter is contrary to Supreme Court precedent. In particular, Petitioner argues that both *McCorpen* and *Brown* contradict this Court's long standing policy concerning a "liberal interpretation of maintenance and cure rights in favor of Seaman". Significantly, however, this issue was not presented at either the District Court level or before the Circuit Court.

It is well settled that this Court will not reach an issue which was not raised, considered, or resolved in the court below but is raised for the first time on appeal.[16] Brown could have made this argument before the Fifth Circuit when Parker appealed the jury verdict or when he sought *en banc* review of the majority's decision. Brown did not and his failure to do so is fatal in that regard.

It has long been known by Petitioner that the Parker was raising the willful defense to his claim for maintenance and cure benefits. It was acknowledged by Petitioner in his writ and was an issue submitted to the jury at trial. When the Fifth Circuit overruled the jury finding with respect to willful concealment and the maintenance and cure, Petitioner twice sought *en banc* review. However, at no point did the Petitioner raise the issue that the *McCorpen* defense was contrary to United States Supreme Court precedent as he does now. Consequently, this argument has been waived by Petitioner.

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16. *Glover v. United States*, 531 U.S. 198, 205, 121 S. Ct. 696, 701 (2001).

3. The Majority properly overturned the jury finding concerning willful concealment in light of Mr. Brown's egregious and admitted misrepresentations.

The majority of the Fifth Circuit, in the denial of the *en banc* request, determined that the *Brown* panel acted properly in reversing the jury's findings with respect to maintenance and cure and willful concealment. Petitioner argues that the panel substituted its opinion for that of the jury and thus violated his Seventh Amendment rights. These arguments, however, ignore the plain law in this case and the ramifications of the incorrect jury findings. Moreover, Brown is arguing that the majority misapplied the law. But, this argument is not compelling pursuant to Rule 10.

The jury determined that Mr. Brown did not willfully conceal his previous medical condition despite the fact that he admitted to same. Also, the jury found that Parker was arbitrary and capricious in its denial of maintenance and cure benefits for the willful concealment defense despite the fact that Brown admitted that he willfully concealed his prior back injury. The majority realized the clear error of the jury's findings in light of Mr. Brown's admissions at trial concerning his intentional concealment of his previous medical condition. And the majority recognized that the willful concealment defense would be of little, if any, value if not applied to Mr. Brown's egregious behavior.

Petitioner's conduct here is nothing short of abhorrent. Indeed, as recognized by the majority, Brown was fired from another employer, LeTourneau, for concealing the same back problems (which he concealed from Parker) only *two* months before he applied to work for Parker. At trial, Brown admitted that he falsified pre-employment medical questionnaires claiming that he had no history of back problems, despite the

fact that he had seen a physician on two separate occasions in different years for two different back injuries and had treated at an emergency room for a "pop" in his back and required a walker and wheelchair. Nonetheless, after Brown concealed this information from Letourneau he was fired for the concealment.

Incredibly, two months later when he applied to Parker, he again concealed this information. Significantly, as recognized by the majority, Brown admitted at trial that because of the LeTourneau termination, he knew that information concerning his prior medical condition was important to Parker when it hired him; but, yet, he still concealed it.[17] In other words, Brown

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17. At trial, Brown conceded that he realized how important post-employment questionnaires are *after* he was fired from LeTourneau for denying his 1998 previous back injury.

> Q. And I believe that you had testified earlier that the reason they, at LeTourneau, got rid of you or didn't want you to work there anymore is because LeTourneau found out about your past; they found out about your lying on the application, or whatever, is that right?
>
> A. Yes, sir.
>
> Q. And the reason LeTourneau, Mr. Fant at LeTourneau came to you and said "Hey, we can't have you working here" is because he showed you that employment application where you checked off "No," about prior back problems, right?
>
> A. Yeah.
>
> Q. And he said "I can't have anybody working here like that who misrepresents the application," right? He told you that?
>
> A. Yes.

(Cont'd)

knew that he could not get a job with Parker unless he falsified pertinent medical information; yet, he did it anyway. This habitual concealment is of the precise kind of abhorrent fraud that the majority recognized vitiates the consent of the employer to the employment contract and is the basis of the willful concealment defense.

Moreover, the majority recognized that during his deposition, Brown repeatedly denied any previous back injuries or accidents despite the fact that he had previous back injuries and an on the job injury while working for LeTourneau. It was this on the job injury which led LeTourneau to discover that Brown had concealed his previous back injury, the concealment of which led to his termination by LeTourneau. The majority recognized that the following deposition testimony was highly egregious and coupled with his lies on his medical questionnaire established the willful concealment defense.

Indeed, during his deposition, Brown, when presented with straightforward, simple questions concerning his medical history and previous accidents, denied any previous accidents or injuries. At trial, Brown admitted the following sworn deposition testimony was false:

> Q. When you worked for LeTourneau, did you have any on-the-job injuries?
>
> A. No.

(Record, Vol. VIII, pp. 97-98, lines 24-2).

(Cont'd)

> Q. So, you knew at that time that answering questions about whether you had back problems or not on that employment application is important to the employer, right? You knew that?
>
> A. I did. (Record, Vol. VIII, p. 115-116, lines 19-12.)

Q. When you worked for LeTourneau for that year in Vicksburg, did you have any type of accident or injury whether it was on the job or off the job?

A. No.

(Record, Vol. VIII, p. 100, lines 1-4).

Q. When you were working for LeTourneau, did you ever have any back problems?

A. No.

Q. Did you ever have to go to a doctor or hospital or chiropractor or any healthcare provider for back problems while you were working for LeTourneau?

A. No.

(Record, Vol. VIII, p. 100, lines 14-22).

Q. Aside from when you had the back strain picking up the sack of corn in '98, aside from that injury up until when you went to work for Parker in August of 2001, did you have any other back injuries?

A. No.

(Record, Vol. VIII, p. 102, lines 2-10).

Q. Did you seek any medical care of any kind for any back-related injuries?

A. No.

(Record, Vol. VIII, p. 102, lines 21-23).

Q. That's because you didn't have any other back injury aside from picking up the sack of corn and what we're here for today, right?

A. Right.

(Record, Vol. VIII, p. 103, lines 11-17).

The sworn deposition testimony above is particularly disturbing because Brown contradicted and recanted *all* of it at trial when he admitted to having prior back injuries and an accident at LeTourneau. The Panel correctly recognized the highly egregious and abhorrent nature of Brown's misrepresentations and thus correctly reversed the jury finding with respect to maintenance and cure. The majority wisely determined that to allow a seaman to create a bogus excuse at trial for material misrepresentations made to the employer on the medical questionnaire would render the willful concealment defense meaningless.

CONCLUSION

The Petitioner's Writ should be denied.

Respectfully submitted,

JEFFERSON R. TILLERY
Counsel of Record
NORMAN E. ANSEMAN, III
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE
& DEGEGRE, L.L.P.
201 St. Charles Avenue
Suite 4800
New Orleans, LA 70170
(504) 582.8432

Attorneys for Respondent